United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-2152

To be argued by
DIANA GARFIELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2152

ANTHONY D'AGOSTINO,

Appellant,

—v.—

W. R. NELSON, Warden
Federal Correctional Institution
Danbury, Connecticut,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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FILED
MAR 21 1978

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ANTHONY D'AGOSTINO,
APPELLANT

v.

W.R. NELSON, Warden Federal
CORRECTIONAL INSTITUTION
DANBURY, CONNECTICUT,
APPELLEE

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue, Brooklyn, New York

That on the 21st day of March, 1978, deponent served the within Brief upon Anthony D'Agostino, 15 Lavrine Road, Saugus, MA 01906

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 21st day of March, 1978

PATRICIA D. O'HARA, Notary Public
State of New York No. 31-4654[illegible]
Qualified in New York County
Cert. Filed in Kings County
Commission Expires March 30, 19 79

Patricia D. O'Hara

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ANTHONY D'AGOSTINO,

Appellant,

—v.—

W. R. NELSON, Warden
Federal Correctional Institution
Danbury, Connecticut,

Appellee.

BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from an order of the District Court (Newman, *J.*) dismissing D'Agostino's petition for a writ of habeas corpus because of non-exhaustion of administrative remedies.

D'Agostino, convicted of conspiring to and making extortionary extensions of credit in violation of 18 U.S.C. §§ 2, 892, was sentenced to an eighteen month term of incarceration and a $1,000 committed fine. On September 13, 1977, D'Agostino sent to the District Court a petition for a writ of habeas corpus which alleged that prison officials had wrongfully denied him industrial and meritorious good time credits on his sentence. On October 14, 1977, Judge Newman dismissed D'Agostino's petition

because of a failure to exhaust administrative remedies. The District Court first noted that the granting or denial of industrial good time credit is a discretionary determination initially to be made by the Bureau of Prisons, subject only to limited review by the courts. Judge Newman then ruled that D'Agostino had not demonstrated that the facts upon which his allegations were based justified circumventing administrative channels. Timely notice of appeal from this decision was filed on November 2, 1977.

Questions Presented

I. Whether D'Agostino's release from federal custody on November 18, 1977, rendered this appeal moot;

II. Whether the District Court abused its discretion in dismissing D'Agostino's petition for failure to exhaust administrative remedies.

Statement of Facts

D'Agostino's eighteen month sentence commenced on October 14, 1976. His maximum term would thus expire on March 13, 1978. Because D'Agostino's committed fine had not been paid by November 16, 1977, his mandatory release date,[1] he was retained in custody until November 17, 1977, when the United States Marshal notified officials at the Federal Correctional Institution, Danbury, Connecticut that payment of the fine had been accepted by the Clerk of the District Court. D'Agostino was then released pursuant to 18 U.S.C. §§ 4163, 4164.

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[1] D'Agostino's statutory good time deduction totaled 108 days, making his mandatory release date December 26, 1977. However, he was credited with forty additional days of extra good time, which accelerated his mandatory release to November 16, 1977.

ARGUMENT

POINT I

D'Agostino's release from federal custody on November 17, 1977, rendered this appeal moot.

D'Agostino was mandatorily released from federal custody on November 17, 1977, pursuant to 18 U.S.C. §§ 4163, 4164. Section 4163 provides that a prisoner shall be released at the expiration of his term less the time deducted for good conduct. Section 4164 states:

> A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

Thus a prisoner mandatorily released is subject to supervision by the Parole Commission until the expiration of his maximum term less 180 days. *Clay* v. *Henderson*, 524 F.2d 921 (5th Cir. 1975), *cert. denied*, 425 U.S. 995 (1976); *Birch* v. *Anderson*, 358 F.2d 520 (D.C. Cir. 1965); *Godoy* v. *U.S. Board of Parole*, 345 F. Supp. 1292 (C.D. Cal. 1972).

D'Agostino's eighteen month sentence commenced on October 14, 1976. His maximum term would extend to April 13, 1978. Since D'Agostino was mandatorily released with less than 180 days remaining on his maximum term, his release on November 17, 1977 was unconditional.[2]

It is well-settled that where a petition for habeas corpus relief attacks only unlawful conditions of confine-

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[2] D'Agostino's maximum term less 180 days would fall on September 16, 1977.

ment rather than the underlying conviction, the petitioner's unconditional release from federal custody moots the issues raised. *United States* v. *Birrell*, 482 F.2d 890, 892 n.2 (2d Cir. 1973); *Ayers* v. *Ciccone*, 431 F.2d 724 (8th Cir. 1970); *Collins* v. *Rivers*, 323 F.2d 606 (4th Cir. 1963); *cf. Quinn* v. *Brown*, 561 F.2d 795 (9th Cir. 1977); *Talbot* v. *Schlesinger*, 527 F.2d 607 (4th Cir. 1975). In his petition for habeas corpus relief, D'Agostino sought only a redetermination of his good time credits. Since no challenge to the underlying conviction was raised, D'Agostino's unconditional release rendered this appeal moot.[3]

POINT II

The District Court did not abuse its discretion in dismissing the petition for a writ of habeas corpus for failure to exhaust administrative remedies.

It is well-established that, in the absence of compelling circumstances, a federal prisoner must exhaust available administrative remedies within the correctional system prior to seeking extraordinary relief in federal court. *Mason* v. *Ciccone*, 531 F.2d 867 (8th Cir. 1976); *Smith* v. *Fenton*, 424 F. Supp. 792 (E.D. Ill. 1976); *Kochie* v. *Norton*, 343 F. Supp. 956 (D. Conn. 1972). Important policy justifications for this requirement include allowing the institution the first opportunity to grant meritorious claims and developing a factual record. See *Mason* v. *Ciccone*, *supra*, 531 F.2d at 870. These factors become

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[3] D'Agostino's "judicial economy" argument (Appellant's Brief at 5) misses the mark. A civil complaint for money damages arising from the incidents alleged would be a separate and distinct cause of action requiring a totally different legal perspective, substantively and procedurally.

more compelling in the context of the claims raised herein. As Judge Newman recognized, the granting or denial of extra good time is a discretionary determination by penal officials. 18 U.S.C. § 4162; *United States ex rel. Colen* v. *Norton*, 335 F. Supp. 1316 (D. Conn. 1972). A court would intervene only if that discretion were abused by disregard of the rules, regulations and policies established by the Bureau of Prisons. *Cf.* 18 U.S.C. § 4166 (Attorney General may restore lost good time); *Williams* v. *United States*, 431 F.2d 873 (5th Cir. 1970). Judge Newman explicitly articulated these well-established legal standards and, finding no exceptional circumstances to justify a different approach, correctly applied them to the instant case.[4]

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[4] For the Court's information, § 4162 permits the Attorney General to award up to three days of industrial good time per month of actual employment for the first year of incarceration and five days per month thereafter. Alternatively the Attorney General can award the same allowance for exceptionally meritorious service. Under Bureau of Prisons Policy Statement 7600.50C (10-31-77), only one earning rate is applicable at a time. Since D'Agostino was incarcerated from October, 1976-November, 1977, he was eligible by statute to earn a maximum of 41 days of extra good time (three days per month for twelve months and five days for the 13th month). On March 4, 1977, D'Agostino was credited with a "lump sum" award of 15 days extra good time for exceptional service. Beginning in March, 1977 through November, 1977, he received a total of 25 extra good time credits on the basis of his industrial employment. Thus, D'Agostino earned forty days of extra good time from the forty-one for which he was statutorily eligible. Additionally, on June 20, 1977, and September 29, 1977, D'Agostino received monetary awards totalling $150.00 for meritorious service.

CONCLUSION

For all of the foregoing reasons, this appeal should be dismissed as moot or, alternatively, the judgment of the District Court should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1978—714—063—ACT—309